Date: 19971003
Docket: F970148
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE CHILD, FAMILY AND COMMUNITY SERVICE ACT
R.S.B.C. 1996, CHAPTER 46

BETWEEN:

B.S.

APPELLANT

AND:

THE DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICE

RESPONDENT

- AND -

Docket: F970156

BETWEEN:

THE DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICE

APPELLANT

AND:

B.S.

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LEVINE

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| Counsel for the Appellant/Respondent: (B.S.) | P.A. Fleming<br>C.D. Sicotte |
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| Place and Date of Hearing: | Vancouver, B.C.<br>August 18-22 and 25-29, 1997 |

I. INTRODUCTION

[1] R., age 10, was apprehended by the Director from her adoptive mother, B.S., on August 1, 1996. For the previous year, R. had suffered from bouts of vomiting, diarrhea and serious infections and had been unable to tolerate any food or nutrition other than fluids fed through an intravenous line. The medical team at Children's Hospital, unable to diagnose any medical reason for R.'s condition, suspected Ms. S. of intentionally injuring R. and were convinced that R. would die if not fed other than intravenously. On July 8, 1996, the doctors obtained a court order excluding Ms. S. from the hospital so that they could restart feeding R. Within three weeks of Ms. S. leaving the hospital, R. was no longer being fed intravenously and had started taking food orally. She was discharged from hospital into the care of a foster parent in October 1996 and has remained healthy since then.

[2] After a protection hearing extending from November 1996 through March 1997, the provincial court judge found that R. was in need of protection. He ordered that the Director retain custody for six months and Ms. S. have liberal access to be

supervised at the discretion of the Director.

[3] Ms. S. appeals the finding that R. was in need of protection and the Director appeals the temporary custody order.

II. BACKGROUND

[4] R. was born prematurely on October 30, 1986 with fetal alcohol syndrome, neonatal abstinence syndrome and cerebral palsy. She has suffered from a host of medical problems during her short life. Within days of her birth, she had two operations to correct blockage of her bowel. She had seizures during her very early years, feeding problems, surgery on her legs, and was developmentally delayed due to mental retardation and the effects of cerebral palsy.

[5] R. lived in foster homes until January 1990, when Ms. S. took her into pre-adoptive care. Ms. S. adopted R. in 1991. Between then and November 1994, R. did well considering her medical problems. She and Ms. S. lived in Kamloops, where R. started school and participated in extra-curricular activities including horseback riding, swimming, bowling and Brownies. R. learned to communicate in a unique sign language and used a symbolic picture language and communication board.

[6] In November 1994, R. developed feeding problems. Her teacher noticed that she had difficulty swallowing, was irritable and had trouble focusing. By August 1995, R.'s paediatrician in Kamloops, Dr. Jonathan Slater, in consultation with a surgeon, decided to insert a gastric tube, or "G-tube", so that R. could be fed directly into her stomach, avoiding the difficulties of chewing and swallowing. Following the surgery, R. experienced pain and developed an infection and diarrhea. Feeding through the G-tube was started and stopped several times because of the diarrhea. R. was discharged from Kamloops hospital on September 12, 1995, was readmitted from September 30 to October 3, 1995 and again from October 6 to 11, 1995, because of the diarrhea.

[7] On October 13, 1995, R. was seen in the Emergency Department at B.C. Children's Hospital and was admitted the next day because of problems with the G-tube and diarrhea. She was taken to Children's Hospital because of a previously-arranged appointment for surgery on her leg. She had surgery to fix her G-tube on October 16, 1995, following which she suffered from pain and developed an infection at the G-tube site. Attempts were made to feed her through her G-tube starting on October 22, 1995, resulting in continuing diarrhea. On October 26, 1995 she had surgery on her leg. She suffered from severe pain following the leg surgery. Feeding trials through her G-tube were attempted on October 31, 1995 and again on November 5, 1995; these had to be discontinued because of vomiting, diarrhea and pain.

[8] The G-tube feedings having been unsuccessful, on November 9, 1995 a "J-tube" was inserted into R.'s jejunum. The J-tube would transport the food through the G-tube, past R.'s stomach and into her bowel. Feedings through the J-tube were started November 9, 1995 and discontinued the same day because of continuous vomiting. At this time, R. developed a blood infection. She continued to vomit and have diarrhea though she was not being fed anything. She could not tolerate even fluid replacement through her J-tube. A central intravenous line was put in and "total parenteral nutrition", or "TPN", feedings of fluids through the IV line, were started. Tests were done which determined that the J-tube was properly placed and no obstructions existed in her bowel, and feeding though the J-tube was again attempted on November 15, 1995. This resulted in diarrhea and severe pain and the feeding was discontinued. Further tests showed on November 23, 1995 that the J-tube was malpositioned.

[9] On December 9, 1995, feeding through the J-tube was attempted again, but on December 12, it was discovered that the J-tube was coiled in R.'s stomach. It was removed on December 14, 1995. R. continued to gag, vomit and have diarrhea despite taking in no food. She also developed more infections, around her G-tube site and in her blood.

[10] In January 1996, Ms. S. wished to take R. back to Kamloops

and plans were made to discharge her on TPN, which Ms. S. was taught to manage. Ms. S. left the hospital on January 14 and R. was transported by air ambulance on January 16, 1996. R. arrived in Kamloops suffering from an infection and was admitted to hospital. She remained in Kamloops hospital until March 4, 1996, when R. was discharged to Ms. S.'s home.

[11] On March 22, 1996, R. was readmitted to hospital in Kamloops suffering from an infection in the "tunnel" of her central intravenous line. R. stayed in Kamloops hospital until April 17, 1996, when she was transferred to B.C. Children's Hospital. During her stay in Kamloops hospital, Dr. Slater twice attempted to reintroduce feeding through her G-tube. These feeding attempts were unsuccessful; R. suffered from retching and vomiting. Venous access devices (VADs) were installed in R.'s chest to provide for TPN feedings, because her central lines had been found to be leaking. The VAD connection was found to be leaking and TPN was leaking out; this was repaired. The TPN line cracked and was repaired. R. developed infections at her VAD sites and in her blood.

[12] R.'s condition became too complex for Dr. Slater to handle in Kamloops. When she was readmitted to Children's Hospital, R. was on an array of medications and was being fed intravenously. She was suffering from infections, diarrhea and vomiting. The VADs were removed, which relieved the infection. Some attempts were made to feed R. through her G-tube, but Ms. S. objected because of the vomiting which resulted.

[13] During April and May 1996, R. underwent a number of tests to try to determine the cause of her vomiting, diarrhea, infections and inability to tolerate any food. She had barium swallows, endoscopies, colonoscopies and finally a laparotomy, invasive surgery in which her abdomen was opened up. All of the tests failed to produce a diagnosis which satisfied the doctors at Children's Hospital.

[14] In June 1996, R.'s condition continued to deteriorate. She had repeated and continuously more serious infections, in her blood, at her G-tube site and in her IV lines. The doctors became convinced that if they could not reintroduce food to R.'s digestive tract, she would die. Ms. S. was reluctant to allow feeding because of the pain it caused R.. Dr. Riddell, the paediatrician, believed they could only attempt feeding if Ms. S. was absent.

[15] On July 8, 1996, an ex parte order was obtained under section 29(3) of the Child, Family and Community Service Act, S.B.C. 1994, c. 27 (now R.S.B.C. 1996, c. 46). The order authorized that "essential health care", feeding, be provided to R. and Ms. S. be prohibited from obstructing the provision of health care by not attending B.C. Children's Hospital for the two-month duration of the order.

[16] After Ms. S. left Children's Hospital, R.'s feeding was started very gradually. Dr. Riddell described the quantities and concentrations of formulae introduced as "ridiculously low". R. continued to have some vomiting, but in lesser and lesser amounts. She developed an infection on July 14, 1996, but feeding continued and the infection cleared. A new J-tube was installed and feeding through it was tolerated. By the end of July, R. was taking some foods orally and intravenous TPN feeding was stopped. Her central intravenous line was removed August 7, 1996. By August 26, 1996, R. was feeding through her G-tube without vomiting. By the time of her discharge on October 3, 1996, she was taking all of her foods orally, which she continues to do today.

[17] The Director removed R. from Ms. S.'s care on August 1, 1996 pursuant to section 30 of the Act. A presentation hearing under section 35 of the Act was held during August and September 1996, resulting in an order on October 3, 1996 that the Director retain custody of R. until further order after a protection hearing, which was to commence within 45 days of the order and continue immediately thereafter. On March 12, 1997, the trial judge gave his reasons finding that R. was in need of protection and on March 26, 1997, made his orders as to disposition. The trial judge's orders resulting from the protection hearing are the subject matters of these appeals.

## III. THE FINDINGS OF THE TRIAL JUDGE

[18] In his reasons, the trial judge found the following facts:

(a) The central fact, which overshadows all others, is the speed and completeness of R.'s recovery after Ms. S. was excluded.

(b) R.'s medical problems from August 1995 through July 1996 could all have been caused by sabotage, fairly easily and without much risk of detection.

(c) If they were caused by sabotage, Ms. S. is the obvious suspect, having the physical opportunity and the medical knowledge. She was the only constant person in attendance on R., the doctors and nurses coming and going.

(d) R.'s quick and complete recovery was due to her successful refeeding in July 1996.

(e) Interference with medical procedures, probably intentional, is the most likely cause of R.'s illnesses. Particularly convincing is the long series of infections in a supposedly antiseptic environment, which ceased almost immediately after Ms. S.'s exclusion.

(f) Ms. S. denied causing the injury, but the trial judge found her to be an unreliable witness.

[19] Having made those findings, the trial judge ruled (at pp. 20-21):

> (a) R. was still in the care of her mother while in the hospital.
>
> (b) She suffered harm while in that care.
>
> (c) There is no proof of a cause unrelated to her mother's care.
>
> (d) There is a reasonable apprehension that her mother may have been the cause of R.'s illnesses or some of them.
>
> (e) I therefore find R. to have been in need of protection on ground (a) of s. 13. I conceive that taking Hinkson J.A. [in Superintendent of Family and Child Service v. C.G. and S.G. (1989), 22 R.F.L. 1 (B.C.C.A.) (the G. case)] literally, I may not need to, but I don't want to leave a loose end.
>
> (f) Alternatively, under the lowered standard of proof laid down by Locke J.A. [in the G. case] I find R. to have been in need of protection on the same grounds. I deliberately refrain from stating what my decision would have been had I had to decide on a balance of probabilities, or any higher standard. That would have placed me back in the dilemma from which the G. case delivered me.

IV. THE APPEALS

[20] The Act sets out a two-stage process at a protection hearing. Under section 40 of the Act, the court must determine if a child is "in need of protection". The definition of "in need of protection" is in section 13. The trial judge found that R. was in need of protection within the meaning of section 13(1)(a): she "has been, or is likely to be, physically harmed by the child's parent."

[21] Once a finding has been made that a child is in need of protection, the court then turns to the issue of disposition, governed by sections 40(3) and 41 of the Act. Ms. S. suggested that R. be returned to her under supervision or that a friend of Ms. S. be given custody. The Director applied for a continuing custody order. The trial judge made a temporary custody order for a term of six months (the maximum term for a temporary order for a child of R.'s age under section 43 of the Act).

[22] In this appeal, Ms. S.'s appeal from the finding that R. was in need of protection was heard first, followed by the Director's appeal of the disposition order. Most of the evidence reviewed on Ms. S.'s appeal is also relevant to the Director's appeal. I will deal first with Ms. S.'s appeal,

followed by the Director's appeal.

V. STANDARD OF REVIEW ON APPEAL

[23] There is no dispute concerning the standard of review on this appeal. This question was reviewed in T.L.O. v. Director of Child Welfare (Alta.) (1995), 175 A.R. 194 at 197-8 (Q.B.). The Court in that case adopted the test set out in Re S.E.M.: M. v. Director of Child Welfare and Child's Guardian (1986), 74 A.R. 23 (Q.B.), in which the Court cited McKee v. McKee, [1951] A.C. 352 (P.C.), adopted in Adams and Adams v. McLeod and Ramstead, [1978] 2 S.C.R. 621, and Lucas v. Lucas (1982), 35 R.F.L. (2d) 216 (Alta. C.A.) and concluded:

> I am of the view that on an appeal under s. 83 of the Child Welfare Act the decision of the Provincial Court judge should not be disturbed unless he has clearly acted on some wrong principle or disregarded significant material evidence or his final award is otherwise clearly wrong.

VI. MS. S.'S APPEAL: WAS R. IN NEED OF PROTECTION?

[24] Ms. S.'s counsel claims that the trial judge erred in finding that R. was in need of protection on the following grounds:

(a) In finding that R. was in need of protection, he held that the standard of proof was a reasonable apprehension of harm rather than the balance of probabilities, based on the authority of Superintendent of Family and Child Service v. M.(B.) and O.(D.) (1982), 37 B.C.L.R. 32 (S.C.) (the M. case) and the G. case. Ms. S. says that because the statute under which these cases were decided has been replaced by the Act, these cases are no longer good law and should not have been followed by the trial judge.

(b) He erred in failing to consider Ms. S.'s right to parent under section 7 of the Charter of Rights and Freedoms, as delineated by LaForest J. in B.(R.) v. Children's Aid Society of Metropolitan Toronto (1995), 9 R.F.L. (4th) 157 (S.C.C.).

(c) He applied a formula derived from the G. case, as interpreted in British Columbia (Superintendent of Family and Child Service) v. H.L., [1995] B.C.J. No. 926 (Prov. Ct.) (QL). Ms. S. says that the G. case is distinguishable on the facts. The trial judge therefore erred in following the case and applying the formula.

(d) He misconstrued or failed to properly weigh portions of the medical evidence. Ms. S. says that there were medical explanations for R.'s condition which were not properly considered by the trial judge.

A. The Standard of Proof: the G. Case and the M. Case

[25] Ms. S.'s first three grounds of appeal turn on one issue: the standard of proof the Director is required to meet to support a finding that a child is in need of protection.

[26] The trial judge followed the G. and the M. cases in finding that R. was in need of protection. Ms. S.'s counsel say that those cases are no longer good law because the statute under which they were decided has been replaced by the Act which reflects different principles and they do not reflect a consideration of a parent's rights under section 7 of the Charter. They say further that G. is distinguishable from this case on its facts.

[27] In G., decided at trial by the same trial judge as this case, there were twin seven-month-old babies who had extensive rib fractures and other injuries. The children were in the care of their parents when the injuries were suffered. The parents offered explanations as to how the injuries could have been caused; these were rejected by the trial judge. The medical evidence was that the injuries must have been intentionally caused. The trial judge found that there was not enough evidence to decide whether the parents had harmed the children or the injuries had been caused by some other cause and held that the children were not in need of protection.

[28] The Court of Appeal reversed the trial judge. Hinkson J.A., with whom Southin J.A. concurred, held at p. 8 that:

> In approaching the resolution of this matter in that way the hearing judge misdirected himself. To begin with he was not conducting a trial which might lead to a finding of guilt of one or other of the parents with respect to the injuries suffered by the twins. Yet he considered that that was the issue before him and having heard the parents testify he was reluctant to find that either of them had abused the twins and caused the injuries which they had suffered. But that was not the nature of the inquiry to be conducted on the hearing; rather, the hearing judge was to consider the evidence led on the hearing and decide on the basis of that evidence whether having regard to the safety and wellbeing of these children they should remain in the custody of their parents or whether they should be temporarily placed in the custody of the superintendent.

[29] Locke J.A. agreed with Hinkson J.A. and went on to adopt the statement of Madam Justice Proudfoot in the M. case at p. 287 (at p. 9):

> While I say the test to be applied is, on the balance of probabilities, as to what is in the best interests of the child, no such test exists when we deal with the element of risk of injury. I am satisfied that a much lower test would be applicable when we are dealing with that aspect.

[30] The G. case was carefully analyzed by the Honourable Judge Stansfield in H.L. He summarized Hinkson J.A.'s decision as follows (at para. 25):

> I understand the ratio of Mr. Justice Hinkson's decision to be that if a child has suffered harm while in the care of her parents, in the absence of proof of a cause unrelated to the parents' care, the hearing judge must protect against the reasonable apprehension that the parents may have been the cause of the injury. The child must in that circumstance be understood to be in need of protection, and the hearing judge must move to the second stage of the inquiry under section 13(1).

[31] The trial judge referred to Hinkson J.A.'s approach in G. as an "end run around the need for a finding of 'in need of protection'", but went on to find R. "to have been in need of protection on ground (a) of section 13". He stated that "I conceive that taking Hinkson J.A. literally, I may not need to, but I don't want to leave a loose end." This is the "formula" referred to by Ms. S.'s counsel.

[32] In H.L., Judge Stansfield concluded that, following the reasoning of Hinkson J.A. the "child must...be understood to be in need of protection". My colleague Humphries J. recently considered the G. case in British Columbia (Director of Child, Family and Community Service) v. J.C., [1997] B.C.J. No. 118 (S.C.) (QL) and said at para. 32:

> Although the court does not explicitly say it, it must be implicit in their judgment that there is a nexus between the safety and wellbeing of the children and the suspected abuse or neglect by the parents, if the children were found to have been in need of protection under section 1(a) of the Act, referred to at page 7 of the reasons.

[33] I interpret Hinkson J.A.'s reasons as implying a finding that the children were in need of protection. Without such a finding, there would be no basis on which the court could make a disposition order. The question is whether the proper standard of proof for such a finding is on the balance of probabilities or some lower standard. The trial judge was of

the view that, based on either Hinkson J.A.'s or Locke J.A.'s reasoning, it was not necessary for him to state what his decision would have been if he had to decide on a balance of probabilities. He made it clear at the hearing of evidence on the issue of disposition that he had not decided that it was more likely than not that Ms. S. had done this to her child.

[34] In H.L., Judge Stansfield spoke in terms of a "reasonable apprehension that the parents may have been the cause of the injury" but concluded (at para. 67):

> I am not ignoring the fact that on a balance of probabilities it appears to me more likely than not that the fractures occurred between January 10 and 13, and that one or other of the parents in dealing with K.'s inconsolable crying "lost it" in one dreadful moment. I have found her to be in need of protection.

[35] The trial judge says that Locke J.A.'s approach of applying a lower standard of proof has not been widely followed; however, it has been approved or applied in British Columbia (Superintendent of Family & Child Service) v. F.(M.E.) (1992), 65 B.C.L.R. (2d) 60 at 65 (S.C.); Kinley v. Superintendent of Family and Child Service (19 April 1996), Vancouver F950822 (S.C.) at pp. 6-7; British Columbia (Director of Child, Family and Community Service) v. R.F., [1996] B.C.J. No. 1979 at paras. 28-29 (S.C.) (QL); J.C. at para. 36.

[36] Thus, the G. case has been interpreted and applied in B.C. as authority for finding that a child is in need of protection, though it has not been proved on a balance of probabilities that a parent is the cause of abuse, neglect or harm.

1. The new Act

[37] Ms. S.'s counsel maintain that the Act expresses a different underlying philosophy and requires a different approach to finding a child in need of protection than the old statute, under which G. and M. were decided. If the G. case allows a finding that a child is in need of protection on a lower standard than the balance of probabilities, they say this is no longer the case under the new Act.

[38] Counsel reviewed the provisions of the Act and compared it with the former statute, the Family and Child Service Act, S.B.C. 1980, c. 11. Counsel for Ms. S. rely principally on the inclusion in section 2 of the Act of principles to guide the interpretation and administration of the Act and in section 4 of factors to be considered in determining a child's best interests, both of which were absent from the former statute. They also point to differences in the definition of "in need of protection".

[39] Section 2 of the Act sets out "Guiding Principles" as follows:

> This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
>
> (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> (d) the child's views should be taken into account when decisions relating to a child are made;
>
> (e) kinship ties and a child's attachment to the

extended family should be preserved if possible;

(f) the cultural identity of aboriginal children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner.

[40] Section 4 provides:

(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

(e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views;

(g) the effect on the child if there is delay in making a decision.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

[41] The definition of "in need of protection" is in section 13 of the Act. It provides as follows:

(1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

(b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;

(c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;

(d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;

(e) if the child is emotionally harmed by the parent's conduct;

(f) if the child is deprived of necessary health care;

(g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;

(h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;

(i) if the child is or has been absent from

home in circumstances that endanger the child's safety or well-being;

(j) if the child's parent is dead and adequate provision has not been made for the child's care;

(k) if the child has been abandoned and adequate provision has not been made for the child's care;

(l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

(2) For the purpose of subsection (1) (e), a child is emotionally harmed if the child demonstrates severe

(a) anxiety,

(b) depression,

(c) withdrawal, or

(d) self-destructive or aggressive behaviour.

[42] Section 2 of the former Act provided that "In the administration and interpretation of this Act the safety and well being of a child shall be the paramount considerations", but did not set out the principles now listed in paragraphs (a) through (g).

[43] The former Act did not set out a list of factors to be considered in determining the child's best interests, but section 14 set out some of the same factors to be considered when making a permanent order and section 47 of the Law and Equity Act, R.S.B.C. 1979, c. 224, required that the best interests of the child be considered in all proceedings under the Act.

[44] Section 1 of the former Act defined "in need of protection" as follows:

"in need of protection" means, in relation to a child, that he is

(a) abused or neglected so that his safety or well being is endangered;

(b) abandoned,

(c) deprived of necessary care through the death, absence or disability of his parent,

(d) deprived of necessary medical attention, or

(e) absent from his home in circumstances that endanger his safety or well being;

[45] These differences and others, according to Ms. S.'s counsel, indicate an intention on the part of the legislature that in protection matters the court is to balance at every stage the safety of the child against her well being and in considering the child's well being, principles such as the family as the preferred environment and the kinship ties of the child are to be considered and weighed against the risk of abuse, neglect or harm to the child. This balancing process, they say, reflects the underlying philosophy and objective of the Act. Counsel adopt the statements of Madam Justice L'Heureux-Dub, in Catholic Children's Aid Society of Metropolitan Toronto (Municipality) v. M.(C.) (1994), 2 R.F.L. (4th) 313 (S.C.C.). She stated at p. 339 that the underlying philosophy of the Ontario statute under consideration in that case was "balancing the best interests of children with the importance of keeping intact the family unit, without neglecting the protection of children in need of protection", to achieve the objective of the statute which "seeks to balance

the rights of parents and, to that end, the need to restrict State intervention with the rights of children to protection and well-being" (at p. 336).

[46] These differences from the former statute also indicate, Ms. S.'s counsel argue, that the onus of proof on the Director is higher than under the former Act. They submit that it is no longer the case that a standard of proof lower than the balance of probabilities will support a determination that a child is in need of protection. That is because the child's safety and well being must be considered, and in considering her well being, harm to her emotional well being from being removed from the home, the importance of the family unit, kinship ties and all of the factors set out in section 2 of the Act must be weighed against the physical harm of abuse or neglect. They say that the standard of proof in other provinces is the balance of probabilities (C.R.B. and S.G.B. v. Director of Child Welfare (Nfld.) (1995), 137 Nfld. & P.E.I.R. 1 (Nfld. S.C.); J.L. and R.L. v. Children's Aid Society of Halifax (1985), 44 R.F.L. (2d) 437 (N.S.S.C.); Catholic Children's Aid Society of Metropolitan Toronto v. D.(A.) (1994), 1 R.F.L. (4th) 268 (Ont. Gen. Div.)) and point out that the Supreme Court of Canada says that "the Children's Aid Society must present a strong case" (B.(R.) at p. 211).

[47] Furthermore, Ms. S.'s counsel submit that the definition of "in need of protection" now requires that it be shown that the child "has been, or is likely to be, physically harmed by the child's parent", while the former statute merely required a finding that the child is "abused or neglected so that his safety or well being is endangered". Ms. S.'s counsel submit that the reference to "likely" and to the child's parent indicates that the generalized finding set out in the G. case is no longer sufficient.

[48] In these submissions, Ms. S.'s counsel rely primarily on the discussion in M.(C.) of the underlying philosophy of the protection legislation and the balancing process. Ms. S.'s counsel say that there is no philosophical difference between the Ontario Child and Family Services Act, R.S.O. 1990 c. C. 11, considered in M.(C.), and the Act, despite differences in wording.

[49] The Ontario statute, like the Act, contains both a paramountcy clause and a list of factors to be considered in determining a child's best interests. The paramountcy clause in the Ontario statute is the first in a list of the purposes of the statute and is "to promote the best interests, protection and well-being of children". "Safety" is not mentioned either in the paramountcy clause or in the balance of the list of purposes, nor is it included in the list of factors to consider in determining a child's best interests. The G., M. and this case are all concerned with the safety of the child, which is the first word mentioned in the Act in both the paramountcy clause and the list of factors to consider in determining a child's best interests. In my view, the Act is clear that the child's safety is the primary consideration in all determinations made under the Act. This was the primary consideration under the former statute and is a significant distinction from the Ontario statute.

[50] In her discussion of the underlying philosophy of the legislation, Madam Justice L'Heureux-Dub, noted (M.(C.) at p. 336) that "The Ontario legislation, when compared to the legislation of other provinces, has been recognized as one of the least interventionist regimes." The third in the list of purposes of the Ontario statute is "to recognize that the least restrictive or disruptive course of action that is available and is appropriate in a particular case to help a child or family should be followed". The status review hearing in issue in M.(C.) was governed by section 57(3) of the Ontario statute. It provides that

> The court shall not make an order removing the child from the care of the person who had charge of him or her immediately before intervention under this Part unless the court is satisfied that less restrictive alternatives...
>
> (a) have been attempted and have failed;

(b) have been refused by the person having charge of the child; or

(c) would be inadequate to protect the child.

[51] Thus, the purposes of the Ontario statute and the specific section in issue in M.(C.) require the court to have reference to "the least restrictive or disruptive" or "less restrictive" alternatives. The Act refers to "less disruptive" measures in sections 30, 33 and 35, in the context of the removal of a child by the Director without court order, but not in either of sections 2 or 13, the sections that guide the court on the determination of whether a child is in need of protection. In my view, that is a significant difference in philosophy between the Ontario legislation and the Act.

[52] This is not say that the balancing process described in M.(C.) has no place in determining under the Act whether the safety of a child has been compromised. In my view, however, the emphasis must be different from that described in M.(C.). The emphasis of the Court of Appeal in G., under the provisions of the former statute, was on the safety and well being of children who had been physically abused. In my view, that is the appropriate emphasis under the present Act where the issue is the safety and well being of a child where there is evidence of physical abuse. There is no difference in philosophy on that issue between the former statute and the Act and the differences between the two statutes do not justify a departure from the authority of G..

[53] Ms. S.'s counsel argue that the reference to "likely" in section 13(1)(a) makes it clear that the standard of proof on a determination of whether a child is in need of protection must be the balance of probabilities. The Director's counsel submits that the reference to "likely" is to provide for situations where abuse or harm has not occurred but is anticipated, as was the case in the lower court in M..

[54] In M., the child was born drug-addicted and was apprehended shortly after birth and kept in hospital for treatment of withdrawal. The provincial court judge found that she was not in need of protection because she had never been in the mother's care and no finding could be made on the basis of anticipated deprivation. Proudfoot J. (as she then was) found the trial judge to be in error when he concluded that he could make a finding that a child was in need of protection only in cases of actual deprivation of care and not in cases of anticipated deprivation.

[55] The reference to "likely" is clearly to anticipated physical harm. That is not the issue in this case. Here the issue is whether R. had been harmed by her parent. The trial judge found, on the authority of G., that the child had been harmed by her mother. The use of the word "likely" in section 13 of the Act does not, in my view, invalidate the authority of G. in these circumstances.

[56] The final argument made by Ms. S.'s counsel with respect to the changes in the legislation is that the reference in section 13(1)(a) of the Act to "the child's parent" requires the court to find, on a balance of probabilities, that the harm was caused by the parent. Under the former statute, the court was required to find that the child was "abused or neglected so that his safety or well being is endangered". There was no reference to the abuse or neglect having its source in the parent. The decision of the Court of Appeal in G. was consistent with the wording of the former statute, counsel say, but the wording of section 13(1)(a) of the Act does not allow a court to find that that a child is in need of protection unless it finds, on a balance of probabilities, that the parent has caused the physical harm.

[57] Of all of the arguments made by Ms. S.'s counsel with respect to the authority of the G. case, this is, in my view, the most compelling. The addition to the definition of "in need of protection" of a reference to harm "by the child's parent" signals a focus on the parent as the source of harm to the child and suggests that the court must make a specific finding, on the normal standard of balance of probabilities, that the parent caused the physical harm.

[58] Despite the change in wording of the definition of "in need of protection", however, I am not convinced that the legislature intended the courts in this province to depart from the reasoning in and authority of G. The Court of Appeal made it clear in G. that where a child has been abused, the safety and well being of that child is the paramount consideration. I have stated my view, based on a review of the Act, that the philosophy of the legislation has not changed despite the changes in wording. It would take a clearer change, in my view, to justify a lower court departing from the authority of G.

[59] I therefore find that the trial judge was correct in applying the G. case under the Act.

2. Section 7 of the Charter

[60] Ms. S.'s counsel say that the trial judge failed to consider Ms. S.'s right to parent which, they say, is a protected liberty right under section 7 of the Charter, on the authority of B.(R.). Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[61] In B.(R.), the child was born prematurely with many medical problems. Her parents consented to medical treatment but, for religious reasons, objected to her receiving blood transfusions. She was found in need of protection under the Ontario Child Welfare Act, R.S.O. 1980, c. 66, and made a temporary ward of the Children's Aid Society. During the wardship, she received a blood transfusion. The parents appealed the wardship orders on the grounds that their rights under the Charter had been violated.

[62] LaForest J., with whom Gonthier, McLachlin and L'Heureux-Dub, JJ. concurred, held (at pp. 206-7) that:

> ...the parental interest in bringing up, nurturing, and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.
>
> ...
>
> ...parental decision making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.

[63] LaForest J. went on to decide that the parents' rights to choose medical care for their child, at issue in that case, were interfered with in accordance with the principles of fundamental justice and the interference was justified under section 1 of the Charter.

[64] Lamer C.J.C. found that section 7 does not protect a parent's rights, but is restricted to the protection of physical liberty. Sopinka J. found (at p. 248) that "it was unnecessary to determine whether a liberty interest was engaged because the threshold requirement of a breach of the principles of fundamental justice was not met." Iacobucci and Major JJ., with whom Cory J. concurred, found that section 7 had no application as a parent's liberty does not extend to a decision to endanger the life of a child by withholding necessary medical care.

[65] The Director's counsel argue that B.(R.) is not authority for the proposition that a parent's rights are protected by section 7. They point out that the four judges who found that such a right exists were in the minority; the other five did not endorse that view. That was the position taken by a majority of the New Brunswick Court of Appeal in New Brunswick (Minister of Health and Community Services) v. J.G., [1997] N.B.J. No. 138 (QL), in which the court considered B.(R.) and rejected it as authority for a section 7 right to parent,

following Lamer C.J.C.'s reasoning that section 7 protects physical liberty. In other cases relied on by Ms. S.'s counsel, in which it was found that a section 7 right to parent exists on the authority of B.(R.), it was either assumed that such a right exists (T.L.O. at p. 200) or the judge mistakenly stated that parental rights were reviewed by the majority, citing the reasons of LaForest J. (C.R.B. and S.G.B. at p. 10).

[66] Ms. S.'s argument is that the trial judge failed to consider her rights under section 7 to make decisions concerning the education, medical care, religion and other matters affecting R.'s upbringing. She does not dispute that the procedure provided in the Act for removing R. from her care is in accordance with the principles of fundamental justice, but submits that the finding that R. was in need of protection, following the "formula" or lower standard of proof set out in G., was not in accordance with those principles. In other words, she maintains that her right to parent R. cannot be interfered with except by a finding on the balance of probabilities that R. was in need of protection. In effect, she says that the B.(R.) case has overruled G.

[67] In my view, the trial judge committed no error in distinguishing the B.(R.) case and deciding that the G. case is still good law in B.C. I do not find it necessary to explore the merits of the argument that the right to parent is protected by section 7 as delineated by LaForest J. in B.(R.). While LaForest J.'s reasoning is compelling, he and his concurring colleagues were in the minority. The reasoning of Iacobucci and Major JJ. is similarly compelling on the facts of this case. Lamer C.J.C. and Sopinka J. did not decide this issue.

[68] As pointed out by the trial judge, the Ontario statute under consideration in the B.(R.) case contained no paramountcy clause. The more recent Ontario statute, which does contain such a clause, is different from the B.C. statute in the ways that I have found are significant on the facts of this case. The issue of the burden of proof and its significance in the determination of whether the principles of fundamental justice are complied with in cases such as this one was not before the Court in B.(R.).

[69] In this province, the G. case, which was decided after the Charter was in effect, has been the authority which governs the determination of whether a child is in need of protection where there have been intentional injuries to the child and evidence that they could have been caused by a parent. Until either the Supreme Court of Canada or the Court of Appeal provides less equivocal guidance as to the application of section 7 in these circumstances, provincial court judges and judges of this Court are bound by the decision of the Court of Appeal in G.

3. Is G. Distinguishable on its Facts?

[70] Counsel for Ms. S. argue that the trial judge forced the facts of this case into the fact pattern of the G. case in order to justify applying the "formula" set out in G. They say that the trial judge should have distinguished G. from this case on its facts.

[71] The trial judge summarized his findings of fact as follows (at p. 15):

> In summary, I can say that the case thus approximates to a fact pattern, familiar in allegations of physical abuse to a child. We see what is apparently the result of intentional injury to the child and the parent is the obvious suspect. But the parent denies causing the injury and we have no direct evidence how the injury was caused. Mr. Bellamy argues, for the mother, that the case doesn't really fit that fact pattern because R.'s various illnesses aren't apparently the result of intentional injury. I agree that in most such cases the relationship of the result to the injury is more clear cut - e.g. bruises, broken bones, etc., that are obviously the result of traumatic injury. I agree that the nature and complication of R.'s illnesses make it more difficult to deduce the cause as injury. But I'm

> convinced by the evidence of Drs. Hlady, Riddell and Israels that interference with medical procedures, probably intentional, is the most likely cause of R.'s illness, and that brings it within the fact pattern.
>
> I'm not just relying on the doctor's opinions here. As I have said, this is essentially a matter of cause and effect, of the weighing of evidence; I regard it as falling within the Court's sphere to rule on the facts that the doctors have related and explained to me, and I have so ruled. Particularly convincing to me were the long series of serious infections in a supposedly antiseptic environment, which ceased almost immediately after [Ms. S.'s] exclusion.

[72] After reviewing Judge Stansfield's decision in H.L., the trial judge ruled that:

> 1) R. was still in the care of her mother while in the hospital.
>
> 2) She suffered harm while in that care.
>
> 3) There is no proof of a cause unrelated to her mother's care.
>
> 4) There is a reasonable apprehension that her mother may have been the cause of R.'s illnesses or some of them.

[73] Counsel for Ms. S. say the trial judge was wrong in finding that R. was in the care of her mother while she was in the hospital, that she suffered harm while in that care and in requiring that there be proof of a cause unrelated to her mother's care. They say that the facts in this case are distinguishable from those in G., but the thrust of their argument is that the trial judge's findings of fact and the inferences and conclusions he draws from those findings are wrong.

[74] The trial judge found that Ms. S. was the only constant person in attendance on R. throughout her stays in hospital. Counsel for Ms. S. say that this does not justify a finding that R. was in Ms. S.'s care. They say she was actually in the care of the hospital staff who made all the decisions. In G., the children were under the care and supervision only of their parents when the abuse occurred.

[75] The trial judge found that R.'s injuries were intentionally caused. Counsel for Ms. S. say that they could have been medically caused or self-inflicted. In G., the medical evidence was that the injuries could only have been caused by external force.

[76] The trial judge found there was no proof of a cause unrelated to Ms. S.'s care. Counsel for Ms. S. say that to require her to prove a cause is offensive in law and points out the danger of following a formula too closely.

[77] To accede to the arguments of Ms. S.'s counsel on this ground of appeal would require that I find the trial judge's findings of fact and the inferences and conclusions he drew from those findings to be wrong. The standard of review on this appeal does not permit me to make such a finding unless I am of the view that he applied some wrong principle or disregarded significant material evidence (see T.L.0., supra).

[78] The reasons of the trial judge describe eloquently the process he followed in weighing the complex and conflicting evidence. In doing so, he did not apply any wrong principle or disregard significant material evidence. He weighed the evidence he heard, made findings of fact and drew inferences from those findings. Those are the proper jobs of a trial judge. He drew a careful, not a slavish, analogy between the facts in this case and those in the G. case. I find he made no error in doing so.

B. The Evidence

[79] Counsel for both parties extensively reviewed the evidence presented in the protection hearing. The evidence included over 10,000 pages of medical records, 51 exhibits and 31 volumes of transcripts.

[80] Ms. S.'s counsel say that the trial judge misconstrued or failed to properly weigh portions of the medical evidence. Essentially, they argue that the trial judge failed to consider the medical evidence presented by the expert witnesses who appeared for the Director that there were possible explanations for R.'s illness other than interference by her mother and for R.'s recovery other than her mother's absence.

[81] The Director's response is that though the doctors admitted there were possible medical causes for R.'s illness, none of them opined that any of these possible causes was the basis for a diagnosis. Rather, their opinions were consistent that there was no medical diagnosis for her illness and that intentional interference by Ms. S. was the likely cause. They further opined that the only way to diagnose intentional interference by Ms. S. was to exclude her from the hospital and see if R. recovered. When that occurred, they became more certain that their diagnosis of intentional interference was correct.

[82] The trial judge made findings of credibility with respect to Ms. S. and Dr. Slater. He found that Ms. S. was not a reliable witness because of claims and correspondence filed with an insurance company that seemed to the trial judge to be deceptive. Dr. Slater's opinions were not accepted because he was found to be an advocate for Ms. S. and not objective. Ms. S. presented no other medical evidence or opinions. The causes for R.'s condition therefore had to be found in the medical evidence presented by the Director.

[83] In this appeal, Ms. S.'s counsel reviewed in detail the varying possibilities raised at the trial that could have contributed to or caused R.'s illnesses and recovery and others that had not been addressed at the trial. No fresh evidence was adduced to support Ms. S.'s counsel's submissions that possibilities not addressed at the trial might have been at play. Clearly, the trial judge cannot be said to have erred in not considering or commenting on matters raised by Ms. S.'s counsel on this appeal that had not been canvassed at the protection hearing; nor am I in a position to consider these submissions without any evidence to support them.

[84] The Director's counsel responded by reviewing the evidence of all of the possibilities raised by Ms. S.'s counsel that had been considered at the trial. He demonstrated that the doctors had considered these possibilities, rejected each of them as a medical cause and maintained their opinions that Ms. S. was the cause of R.'s illnesses and her absence the reason for R.'s recovery. These matters are raised and discussed by the trial judge in his reasons. He states in his reasons that he was not just relying on the doctor's opinions but weighed the evidence in making his ruling.

[85] The evidence in this case was clearly confusing and difficult for all concerned, including the trial judge. He referred to the lack of direct evidence of sabotage and that Ms. S. was the perpetrator. He described the other factors that could have been responsible for R.'s recovery as "speculations and possibilities". He found "particularly convincing...the long series of serious infections in a supposedly antiseptic environment, which ceased almost immediately after [Ms. S.'s] exclusion."

[86] I find that the trial judge made no error in his findings of fact on the evidence.

C. Conclusion on Ms. S.'s Appeal

[87] I find no error in the finding of the trial judge that R. was in need of protection. Ms. S.'s appeal is dismissed.

VII. THE DIRECTOR'S APPEAL: THE DISPOSITION ORDER

[88] Having found that R. was in need of protection, the trial judge proceeded to consider the appropriate disposition order under section 41 of the Act. In his reasons for decision

finding R. in need of protection, he stated that he was leaning in favour of a six-month temporary custody order. The Director asked for for a continuing custody order under section 41(1)(d), while Ms. S. asked that the child be returned to her under supervision under section 41(1)(a) or that R. be placed in the custody of a friend under section 41(1)(b). In his reasons for disposition, the trial judge confirmed the six-month temporary custody order.

[89] The trial judge rejected Ms. S.'s suggestion that R. be returned to her, stating that "given the in need of protection finding, it would be illogical and inconsistent". He rejected her suggestion that R. be placed in the custody of a friend as a "non sequitur", in view of R.'s special needs and the history of the case. He also rejected Ms. S.'s request that she have the power to make decisions about R.'s education and religious upbringing as "impractical".

[90] The trial judge gave six reasons for the six-month temporary custody order:

(a) A six-month temporary custody order was made in the G. case.

(b) The low standard of proof in protection cases adopted in the G. case means the court might be wrong and it should leave a six-month grace period.

(c) Section 2 of the Act directs the court to consider principles in addition to the safety and well-being of the child, in particular (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents, and (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided.

(d) R. has a very short life expectancy which makes it difficult and inappropriate to try to settle her permanently with someone else.

(e) Ms. S.'s parenting powers for special needs children have been characterized and accepted as good and every attempt should be made to salvage her dedication.

(f) Dr. Derryk Smith, the child psychiatrist who examined Ms. S., testified that if Ms. S. did not accept the court's conclusions, that did not automatically mean that trying to treat her was necessarily a futile exercise.

[91] The Director says that the trial judge misconstrued the evidence of Dr. Smith, failed to consider the statutory tests applicable to an application for a continuing custody order and failed to give paramount consideration to R.'s safety and well being. He also claims that the trial judge wrongly excluded certain similar fact evidence.

[92] The test to be applied by the court in considering a continuing custody order is found in section 41(2) of the Act:

> (2) The court must not order that the child be placed in the continuing custody of the director unless
>
> (a) [not applicable]
>
> (b) [not applicable]
>
> (c) the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent.

[93] The Director takes the position that none of the six reasons given by the trial judge for making a six-month temporary custody order addresses the questions of the nature and extent of the harm R. suffered or the likelihood of future harm. He says that the finding that R. was in need of protection on the basis that there was a reasonable apprehension that Ms. S. had intentionally injured R. by interfering with and sabotaging her medical treatment for over a year, resulting in chronic pain, diarrhea, vomiting, life-

threating infections and invasive medical procedures, establishes that R. was subject to abuse of the severest nature and the only proper order in those circumstances, to protect R.'s safety and well being and ensure her best interests, was a continuing custody order. Any doubts about the finding that R. was in need of protection are irrelevant, he says, when it comes to disposition. He further says that the trial judge considered the likelihood of future harm only in the context of whether there was any possibility of treatment for Ms. S. in light of her denial of any involvement in causing R.'s illnesses, and that he misconstrued the psychiatric evidence in concluding that there was some hope of treatment.

[94] Counsel for Ms. S. say that in his reasons for finding R. in need of protection, which he incorporated into his reasons for disposition, the trial judge considered in detail the nature and extent of the harm R. had suffered. They say further that the trial judge considered the likelihood that R. would suffer future harm by refusing to allow Ms. S. to make future education and religious decisions for R. and by considering that there was some possibility of a change in Ms. S.'s actions. They also say that in making a six-month temporary custody order instead of returning R. to Ms. S., the trial judge must have considered the likelihood of future harm.

[95] In my view, the trial judge was exquisitely aware of the nature and extent of the harm suffered by R. His reasons for decision make that abundantly clear and he specifically incorporated those reasons into his reasons for disposition.

[96] In making his order, the trial judge faced again the dilemma he had faced as the trial judge in the G. case. He found an analytical roadblock to making an order other than a continuing custody order in a case where the parent denies any involvement in the abuse of the child but the court has found the child in need of protection on the reasonable apprehension that the parent was the source of the abuse. In this case, he found a way around that roadblock by relying on the decision of the Court of Appeal in G. and in his interpretation of the psychiatric evidence.

[97] In G., the Court of Appeal did not consider alternative disposition orders to a six-month temporary custody order as that is the order the Director sought in that case. Nonetheless, the case is authority that a temporary custody order is an appropriate order in circumstances such as existed there and here: denial by the parent of involvement in abuse and a finding by the court that the parent may have been the perpetrator. I interpret the trial judge's reference to the disposition order in the G. case as relevant in his consideration of whether a continuing custody order was appropriate given the nature and extent of the harm suffered by R..

[98] The psychiatric evidence was generally negative, but not entirely so. Dr. Smith testified that therapy would be of little value if Ms. S. continued to deny any involvement in harming R.. Dr. Fisher, an expert in Munchausen's Syndrome by Proxy, was somewhat equivocal. He testified that if Ms. S. continued to deny any abuse, she could not be treated in a "psychological parenting psychiatric way", but went on to suggest that appropriate support and monitoring in the home under a temporary custody order may be a "middle of the road position". Based on Dr. Fisher's evidence, the trial judge did not misconstrue the psychiatric evidence in concluding that psychiatric treatment would not necessarily be futile.

[99] While the balance of the trial judge's reasons for disposition do not track the language of the Act by referring specifically to R.'s safety and well being and to the factors to be considered in determining her best interests, his reasons as a whole demonstrate his awareness of the guiding principles and factors the Act requires the court to consider. The Director argues that there are analytical flaws in the trial judge's analysis; the trial judge shows his awareness of that when he says "as life goes on, I am cognizant that the law sometimes in these things is a bit of a blunt instrument". The decision facing the trial judge and this court involves the balancing of the most fundamental elements of life: a child's life and safety, her relationship with her mother, a mother's role in parenting her child. These factors do not readily

conform to a pure analytical process.

[100] The guidance of the Supreme Court of Canada in Adams and Adams v. McLeod and Ramstead to appellate courts considering issues involving custody is apt (at p. 625):

> There is no need to cite any authority to delineate the task of a court upon an infant's custody issue. Time after time, and more particularly through all the latter part of this century, it has been said and repeated that the one cardinal issue is the best interest of the infant and that all else is secondary. How then is that best interest to be determined? Again our courts have been unanimous that the most authoritative pronouncement thereon is by the trial court judge who hears the evidence and assesses it. I commence with the statement by Lord Simmonds in McKee v. McKee, at p. 360:
>
> > Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

[101] I am of the view that the trial judge did not act on any wrong principle or disregard material evidence in making a six-month temporary custody order in this case. In all of the unique circumstances of this case, I am of the view that the decision of the trial judge should not be interfered with by this court.

[102] Since the decision of the trial judge is upheld, it is not necessary for me to deal with the question of similar fact evidence.

[103] The Director's appeal is dismissed.

VIII. COSTS

[104] Neither party made submissions as to costs. Since neither party was successful in his or her appeal, each party will bear his or her own costs of both these appeals and the Rule 18A application heard earlier.

"Levine, J."